

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original Affidavit of Mailing

74-1899

To be argued by
ALVIN A. SCHALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1899

UNITED STATES OF AMERICA,

Appellee,

—against—

EDWARD TAYLOR HINMAN,

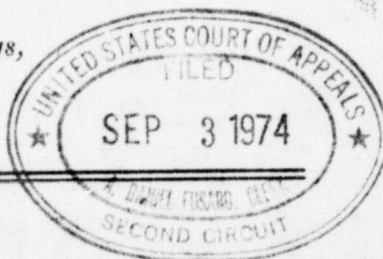
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TEAGER,
*United States Attorney,
Eastern District of New York.*

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1899

UNITED STATES OF AMERICA,

Appellee,

—against—

EDWARD TAYLOR HINMAN,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Edward Taylor Hinman appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Mishler, *Ch.J.*), entered June 7, 1974, which judgment convicted appellant, after a jury trial, of knowingly and intentionally conspiring to possess and distribute heroin, in violation of Title 21, United States Code, Section 846. On June 7, 1974, appellant, who is free on bail pending appeal, was sentenced by Judge Mishler to a term of imprisonment of one year and a day, in addition to a special parole term of five years.*

* Appellant was tried on Count One of a three count indictment. Named in this count with him were Frank Seaman and Daniel Homen. Seaman and Homen were also charged with substantive offenses in Counts Two and Three of the indictment. Seaman and Homen pled guilty to the conspiracy charge and, at the time of their sentencing, Counts Two and Three against them were dismissed. Neither Seaman nor Homen testified at the trial of appellant, who was a fugitive until November of 1973.

On appeal, appellant asserts three grounds upon which he alleges his conviction should be reversed: first, the Government failed to present sufficient independent non-hearsay evidence of appellant's participation in the conspiracy in order to allow the admission of hearsay statements against him; second, the trial court erred in not excluding Seaman's statements as being unreliable hearsay; and third, appellant's case was prejudiced by Judge Mishler's interruption of defense counsel's summation.

Statement of Facts

The major portion of the Government's case was presented through Special Agent Joseph Salvemini of the Drug Enforcement Administration. On October 30, 1972, at the Market Diner in Manhattan, Agent Salvemini was introduced by an informant to appellant, who was then using the name "Teddy" (38, 42).^{*} Acting in an undercover capacity, Agent Salvemini discussed with appellant the purchase of narcotics. Appellant told Salvemini of friends he had in the San Antonio-Austin, Texas area who were dealing in large quantities of heroin, cocaine and marijuana. He explained that his friends were stashing these drugs in certain rented farms in the Austin-San Antonio area and that through his Texas connections, he could provide Salvemini with up to a kilogram quantity of heroin (39). Appellant cautioned, however, that initially he desired to conduct a few smaller transactions so that he and Salvemini could get to know each other better. Salvemini agreed and requested a sample of the heroin (39). Appellant indicated he had a sample with him and at this point he and Salvemini left the table where they were sitting with the informant and went downstairs to the men's room of the Market Diner. Inside the men's

^{*} All references are to the trial transcript unless otherwise indicated.

room, appellant gave Salvemini a small plastic package, saying that this was the kind of heroin he could get from his people in San Antonio (39-40). Salvemini and appellant then returned to their table upstairs, where it was agreed that Salvemini would get appellant's phone number from the informant and would be in touch with appellant if the sample proved satisfactory (42).

Approximately two weeks after the October 30th meeting, Salvemini placed a call to appellant at the number which he had received from the informant: 569-9362, area code 703, in the Washington, D.C.-Alexandria, Virginia area (45). Over the phone appellant stated that there was a possibility that the transaction would be conducted in the immediate future, adding that on short notice he would come to New York with heroin (46-47). Later that same night, on instructions from appellant, Salvemini called appellant again. At this time appellant stated that he still anticipated that he would be able to come up to New York on short notice, and he asked Salvemini for a phone number where he could contact him. In response, Salvemini gave appellant the name "Joseph Scozzaro" and an undercover phone number (47-47a).

Approximately a week to a week and a half later, Salvemini received a call from appellant. Appellant stated that he was having some difficulty in getting the man from San Antonio to bring the heroin to New York, but that he was still trying and that he expected something soon. Appellant then asked Salvemini to come to Washington, D.C. to meet with his people from San Antonio to work out the problems. When Salvemini refused, appellant agreed to go to San Antonio himself, if possible, to try to work something out (48).

In the meantime, arrangements were made for a meeting between Agent Salvemini and one of appellant's co-defendants, Frank Seaman. At the Market Diner on

December 7th Seaman met Salvemini and told Salvemini that, as proof of Salvemini's ability to do business, he expected to be shown a quantity of money, saying "... you already seen I can handle my end of the bargain, already received a sample of what I can do" (51).

Seaman and Salvemini then drove downtown to a restaurant in Lower Manhattan. Enroute Seaman said that he had brought with him to the Washington, D.C. area from San Antonio a pound of heroin which had been diluted and cut into two pounds. One of these pounds had been sold, Seaman confided, but the other was being held by appellant in Washington and could be readily brought to New York (51-52). Seaman then added that the package Salvemini would be getting through him would be "twice as good as the one I sent you through Teddy" (52).

After arriving at the restaurant, Salvemini exhibited to Seaman \$15,000 in official Government funds. Seaman then disclosed to Salvemini the details of his narcotics operation, explaining that his people were using rented farms in the San Antonio area to secrete large quantities of cocaine, marijuana and heroin (53). Salvemini and Seaman then drove back to the Market Diner, and in the course of this drive tentative agreement was reached as to the price which Salvemini would pay for the heroin (53). Seaman stated at this time that he, not appellant, would be handling this delivery, and, prior to parting company, Salvemini furnished to Seaman the same undercover phone number he had earlier given to appellant (53-54).

Five days later, on December 12th, after Salvemini and Seaman had confirmed their arrangements on the telephone, Seaman and co-defendant Daniel Homen arrived at LaGuardia Airport, where they were met by Salvemini (55). Shortly after Seaman and Homen had picked up their bags from the claim area, Salvemini and Seaman proceeded to the men's room in the Transworld Airways

terminal, where Seaman delivered to Salvemini a quarter of a kilogram of heroin. Upon leaving the men's room, Salvemini gave a pre-arranged signal, and Seaman and Homen were promptly arrested by agents of the Drug Enforcement Administration (55-56, 65, 30-32).

Seized from Seaman at the time of his arrest was a small brown address book (65-66). On one of the pages of this address book was found the name "Ted Nineman", with the address 7208 Calamo Street, Springfield, Virginia, and the phone number 569-9362, area code 703 (72). Agent Salvemini identified the above phone number as the same number at which he had previously contacted appellant (72).*

Appellant called no witnesses and did not himself take the stand.

ARGUMENT

POINT I

Appellant's participation in the conspiracy was established by a fair preponderance of nonhearsay evidence, so that hearsay statements of co-conspirator Frank Seaman were properly admitted in evidence.

Appellant argues that the trial court improperly admitted in evidence, through the testimony of Agent Salvemini, hearsay statements of alleged co-conspirator Frank Seaman. Appellant bases this argument on the contention

* Also testifying for the Government were Special Agents Frank DiCarlo (104-106) and Richard Keckler (107-110) of the Drug Enforcement Administration, and forensic chemist Edward Manning (22-37). DiCarlo and Keckler testified as to surveillance of Agent Salvemini during his meetings with appellant and Seaman; Manning testified as to his analyses of the substances received by Salvemini from appellant and Seaman.

that the Government failed to establish a conspiracy "*prima facie*" to support the admission of these statements.

It is a well recognized exception to the hearsay rule that the declarations of one conspirator may be used against another conspirator not present, if the declarations were made during the course of and in furtherance of the conspiracy charged. *Lutwak v. United States*, 344 U.S. 604, 617, *reh. denied*, 345 U.S. 919 (1953); *Anderson v. United States*, — U.S. —, 94 S. Ct. 2253, 2259 (1974). Such hearsay evidence may only be admitted against a defendant, however, where there is independent non-hearsay evidence of the existence of the conspiracy and the defendant's participation therein. *Glasser v. United States*, 315 U.S. 60, 74 (1942). The Second Circuit has adopted the rule that in order for hearsay evidence to be admitted under the co-conspirator exception the defendant's participation in the conspiracy must be established by a "fair preponderance" of independent non-hearsay evidence. *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub nom. Lynch v. United States*, 397 U.S. 1028 (1970).

In the instant case appellant showed, by his own acts and statements, that he was part of a narcotics conspiracy. When he met with Agent Salvemini at the Market Diner on October 30th, he delivered a sample of heroin. More importantly, however, this delivery was preceded and accompanied by statements concerning his drug sources in the Austin-San Antonio area in Texas and by references to the manner in which these sources stashed their narcotics on rented farms (38-40). Significantly, Agent Salvemini testified that when he was given the sample by appellant in the men's room at the diner, appellant stated that the sample was somewhat representative of the quality of the drugs that *his people* (emphasis added) from San Antonio had available. Also revealing is the final telephone conversation between appellant and Salvemini. In this conversation appellant said that he was having problems getting the

man to come up from San Antonio and that he expected that if Salvemini could come to Washington to meet with his people from Texas, the problems would be alleviated (48).

Appellant's own acts and statements clearly establish by a fair preponderance of the evidence that appellant was part of a narcotics conspiracy. Appellant's references at the Market Diner and on the telephone to his connections in the San Antonio, Texas area may fairly be taken to indicate that he was not acting alone, but in concert with others. Appellant admitted as much himself when he made it clear in his final conversation with Agent Salvemini on the telephone that there had to be some kind of a meeting (either involving him or Salvemini) with the Texas people before the proposed transaction went forward. If appellant had simply been a one man operation, instead of a link in a chain of distribution, it is more likely that he would have simply told Salvemini at this point that the deal was off, instead of indicating that the transaction could possibly go forward if further meetings were held.

The independent non-hearsay evidence of a conspiracy which is required to support the admission against a defendant of hearsay statements of an alleged co-conspirator may be totally circumstantial, *United States v. Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968), and the judge is permitted, in making his determination as to the sufficiency of the independent evidence, to draw such inferences as the established facts permit. See *United States v. Padilla*, 374 F.2d 996, 998 (2d Cir. 1967); *United States v. Santana*, — F.2d —, slip opinion 5299, 5305 (2d Cir. August 14, 1974). From appellant's delivery of the sample and from his statements to Agent Salvemini at the Market Diner and over the telephone the trial court could have reasonably inferred that appellant was a party to a conspiracy to possess and distribute narcotics.

Additional independent non-hearsay evidence of appellant's involvement in the conspiracy with Frank Seaman and Daniel Homen emerges from an examination of the events which occurred after appellant and Agent Salvemini had their final telephone conversation. The next thing that happened after appellant asked Salvemini to come to the Washington, D.C. area to meet with the Texas people was the informant's introducing Seaman to Salvemini on December 7th at the Market Diner (89). This meeting was followed on December 12th by the arrival of Seaman and Homen at LaGuardia Airport, the delivery of the quarter of a kilogram of heroin and the arrest of Seaman and Homen (55-57, 67-69, 71-72). These events of December 7th and 12th were all acts, and, as was emphasized by Judge Friendly in *United States v. Geaney, supra*, the acts of a co-conspirator "stand on quite a different basis" from utterances. *United States v. Geaney, supra*, n. 3 at 1120. More specifically, since they are not intended to be a means of expression, acts (such as Seaman's arrival in New York on December 7th and his delivery, with Homen, of the heroin on December 12th) are not treated as hearsay and are admissible to prove the existence of a conspiracy. *Lutwak v. United States, supra*, 617-619. Also probative are the entries in Seaman's address book^{which} was admissible as circumstantial evidence showing association between appellant and Seaman. *United States v. Bennett*, 409 F.2d 888, 895 n. 6 (2d Cir.), cert. denied, sub nom. *Haywood v. United States*, 396 U.S. 852, reh. denied, 396 U.S. 949 (1969); *United States v. Cusumano*, 429 F.2d 378, 381, cert. denied, sub nom. *Riggio v. United States*, 400 U.S. 830 (1970).

Seaman's arrival in New York on December 7th, the delivery of the heroin by Seaman and Homen on December 12th and the recovery from Seaman of the address book with appellant's telephone number in it, all coupled with and following the delivery of the sample by appellant and his statements to Agent Salvemini, constituted substantial independent non-hearsay evidence from which the trial court could have reasonably concluded that appellant was conspiring with Seaman and Homen.

Relying on *Dutton v. Evans*, 400 U.S. 74 (1970), and *United States v. Puco*, 476 F.2d 1099, *rehearing and petition for rehearing en banc denied*, 476 F.2d 1106 (2d Cir.), *cert. denied*, 414 U.S. 844 (1973), appellant asserts in addition that it was reversible error for the trial court to admit the hearsay declarations of Frank Seaman because these statements were crucial to the Government's case and did not bear sufficient indicia of reliability. The first part of this argument was foreclosed by the *Puco* panel when it denied the Government's petition for rehearing:

The Government suggests that from now on, . . . before a district judge decides that the declarations of a co-conspirator may be admitted, the judge must determine not only that the declaration is "reliable" but also that it is neither "crucial" to the Government's case nor "devastating" to the defense. The panel opinion made no such holding. In referring to the latter two criteria, we were acting out of caution—perhaps with an excess of that quality. . . . Specifically, we did not and do not hold that a trial judge must find, before admitting a conspirator's declaration, that it is not "crucial" to the Government's case or "devastating" to the defense.

United States v. Puco, 476 F.2d at 1107.

Appellant's second argument, that Seaman's statements do not bear sufficient indicia of reliability, is totally unsupported by the facts of the case. In the first place, as discussed above, a conspiracy was clearly established, both by the acts of Seaman and by evidence seized from him, as well as by appellant's own acts and admissions. Seaman's statements when he was negotiating with Salvemini "were not only in furtherance of the conspiracy . . . but . . . were also against his own penal interest." *United States v. D'Amato*, 493 F.2d 359, 365 (2d Cir. 1974) (and cases cited therein). Moreover, appellant's own references to his Texas connections and to the drug stashes on rented farms

in the San Antonio area serve to corroborate much of what Seaman said. In addition, Seaman's truthfulness is further supported by the fact that he did what he said he would do: he delivered narcotics to Salvemini and enabled the conspiracy to succeed.*

POINT II

Judge Mishler's cautionary instruction during defense counsel's summation did not prejudice appellant's case.

In the course of his summation, defense counsel referred to the fact that Frank Seaman did not testify in appellant's trial. At this point Judge Mishler interjected an instruction to the jury:

Mr. Rosenthal: I can't cross-examine Mr. Seaman. He's not here. I can't ask him any questions. But even if he told that to the agent: I am with Teddy, how do we know that that is true? How do we know even if he said: I am with Teddy, I can get the stuff, I work with him. We don't have Mr. Seaman here. We can't look at him to find out if he's a truthful witness.

Even if we accept the agent's word—

The Court: I shall charge that Mr. Seaman is available to both sides and you can draw no adverse inference on either side for the failure to produce Mr. Seaman (117-118).

* Appellant contends that the only hearsay statement of Seaman implicating him in Seaman's reference to the sample "sent . . . through Teddy." This is not correct. When Seaman and Salvemini first met, Salvemini was told that he had already seen a "sample" of what Seaman could do. Later on, Seaman said that appellant was waiting in Washington with a pound of heroin.

Appellant argues that Chief Judge Mishler's interruption "could have misled the jury into believing that counsel's statements were incorrect and that the truthfulness of Mr. Seaman's statements could not be questioned" (Appellant's Brief, page 9).

Appellant's claim is meritless. Judge Mishler's mild cautionary instruction was a clear and proper expression of the law, *United States v. Evanchik*, 413 F.2d 950, 953 (2d Cir. 1969); *United States v. Crisona*, 416 F.2d 107, 118 (2d Cir. 1969), which was undoubtedly offered to prevent the jury from believing that Frank Seaman was within the exclusive control of the Government.

CONCLUSION

The judgment of conviction should be affirmed.

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
ALVIN A. SCHALL,
Assistant United States Attorneys,
Of Counsel.

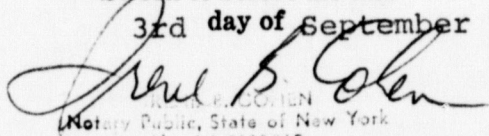
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EASTERN DISTRICT OF NEW YORK, ss:

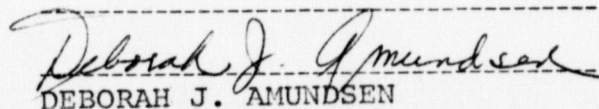
DEBORAH J. AMUNDSEN, being duly sworn, says that on the 3rd
day of September 3, 1974, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, 2 two copies of the brief for the appellee
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

Louis R. Rosenthal, Esq.
16 Court Street
Brooklyn, New York 11241

Sworn to before me this
3rd day of September 1974


Notary Public, State of New York
No. 24-0603965

Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975


DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

United States Attorney,
Attorney for _____

To:

Attorney for _____
=====

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

United States Attorney,
Attorney for _____

To:

Attorney for _____

----- Action

No.-----

===== UNITED STATES DISTRICT COURT
Eastern District of New York =====

-----Against-----

=====

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201
=====

Due service of a copy of the within _____
_____ is hereby admitted.

Dated: _____, 19____

Attorney for _____

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